

# Rescue Package for Fundamental Rights: Comments by RENATA UITZ

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In order to fully appreciate the [Heidelberg proposal](#), I believe it is important to read it not only as a reaction to the developments of the last year and a half in Hungary, but as a response to a deeper problem of the European Union, of which the Hungarian case is only a grave symptom. From the EU perspective what makes the Hungarian case worthy of reflection is the lack of compelling force in the reactions of the EU to national developments which clearly appeared to go against fundamental principles of constitutionalism, rule of law and the protection of human rights. While before and during the first half of 2011 (i.e. before and during the Hungarian presidency of the Council) the EU's reluctance might be attributed to mainly political reasons, the overall tiptoeing reflects deep seated problems and tensions within the Union's own architecture.

The shorthand description of the source of these problems is what many refer to as 'the gap between accession conditionality and membership requirements'.

As Christoph Hillion explains (in Craig / De Burca: The Evolution of EU Law, 2nd ed. 2011) with the latest cycles of enlargement a thick layer of requirements generated by various actors in such European networks as the Council of Europe and its Venice Commission, or the OSCE and its human rights directorate (ODHIR) were layered onto the EU's own 'Copenhagen criteria'. Outside the framework of the accession process, however, these conditions become difficult, if not impossible, to impose on member states partly because of the lack of available procedures. The suspension of membership as foreseen in Article 7 of TEU is certainly a means of last resort, while post-accession monitoring of certain matters (as used in the case of Romania or Bulgaria) is clearly not available as a measure towards other, older members. The other part of the explanation for the lack of EU engagement stems from the fact that many layers in the thick coating of the Copenhagen criteria are best associated with some 'common European heritage' on certain matters, and not with well defined Union competences.

To make any attempt proposing a solution to practical conflicts stemming from 'the gap' needs to also respond to – at least indirectly – to the seemingly age-old dilemma concerning the extent to which the EU should be entitled to compel its member states in maintaining the qualities of their democracies and the protection they offer to fundamental rights under their national constitutions. After the rejection of an ambitious proposal in the 1950's to this particular problem which favored a less supranational approach, famously it was the ECJ (often in cooperation with the lower instance national courts) that came to remind member states of some key membership obligations, despite the occasional resistance from national constitutional courts. Therefore, it does not seem revolutionary that the Heidelberg

proposal also views the judicial route as a means of triggering fundamental change in the architecture of the Union.

As a side-note: One may certainly have second thoughts about the value of turning to courts against a country where the government of the day has constitution making majority and has already demonstrated its ability to withdraw a cardinal statute affecting a fundamental right (freedom of religion) and then pass another one in less than two weeks time. The current Hungarian political make up, however, is rather unique, therefore it is important to address the proposed route beyond this rather specific setting.

On its surface, the proposal is modest. After all, it does not require more than that member states of the Union respect fundamental rights of citizens – a condition which was imposed upon said member states upon their entry into the Union. It is beyond the ambitions of my comment to explore whether the concept of Union citizenship is the right vehicle to achieve this aim (taking into account Article 2 of TEU, Article 6 of TEU together with Article 51 of the Charter, and further developments in citizenship jurisprudence since [Zambrano](#)). The central claim about the enforcement of fundamental rights across the Union, especially if the violation is committed by a member state, may possibly be made and then operationalized with developing several other principles contained in the Treaties. The same may stand for such constitutional principles as democracy or numerous aspects of the rule of law which are also mentioned in Article 2 of TEU.

In order to truly make a difference, the additional judicial remedy in the fundamental rights context will need to be able to alter the currently existing, rather piecemeal – and ultimately, so far, inefficient – approach the EU appears to undertake in the face of large scale, systemic violations of its basic precepts. It is important to recall, that the first compelling response of the Union to developments in Hungary was on changes in media regulation. What is most worthy of attention in the present context is that the EU response was based predominantly not on Article 11 of the Charter, but on much narrower (and more technical) violations of the the EU audiovisual and media services directive. Thus, it is at least arguable that while the Commission's intervention was instrumental in triggering an amendment to the media rules, the EU intervention did not call for a major governmental reversal on media issues as a whole. It is especially important to be mindful of the pressing need to offer a more comprehensive response, because courts by their very nature have a tendency to offer a pinpointed remedy in the actual case, and avoid addressing the underlying systemic problems.

As a related challenge, one also has to account for the plethora of regional institutions which may be involved in disciplining member states. The classic example here would certainly be pointing out a potential clash between the ECtHR and the CJEU. The bigger picture, however, includes a range of other institutions in addition to the European courts, many of which – like the Venice Commission – intervene upon the invitation of the member state affected and cannot impose binding obligations in the opinions and recommendations. It will be interesting to see whether the CJEU will be able to find a way to reflect on parallel developments from the rest of Europe. After all, a wide range of EU accession (membership) criteria

were inspired by the work of these non-EU and non-judicial fora on key constitutional and fundamental rights issues. That would be a sign, against some odds, that institutions do matter after all. Till then see [Francis Fukuyama](#) to the opposite effect.

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